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No. 82-805

In the Supreme Court of the United States

October Term, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

vs.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AD HOC GROUP OF STUDENTS AND PARENTS IN LUBBOCK INDEPENDENT SCHOOL DISTRICT AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

This Ad Hoc Group of Students and Parents in Lubbock Independent School District respectfully moves the Court, pursuant to Supreme Court Rule 42, for leave to file the accompanying brief as amicus curiae in support of the petition for the grant of a writ of certiorari. The names and addresses of those comprising this ad hoc group of individuals is appended to this motion.

The consent of the parties to the filing of the brief has been sought. While Petitioners have consented, Respon-

dent has refused such consent. Accordingly, amicus proceeds by this motion.

As set out in the statement of Interest of Amicus Curiae found below, amicus submits that it is uniquely situated to assist the Court in evaluating the significance of the vital issues presented by the petition herein. The students represented in this group are among the relatively small segment of the population who have strong religious beliefs which are integral to every part of their lives and which demand expression in their lives. Prayer is an essential part of this life-style and commitment; for them, the religious dimension cannot be separated from the secular. These students draw encouragement and strength for daily living from prayer, both individual prayer and group prayer. Group prayer with other students is especially encouraging and enriching to these students. In addition, to many of the students, an opportunity for informal group Bible study and discussion is extremely important. They have no desire to attempt to force an unwilling student to pray or study with them, nor do they desire to have the leadership of their activities taken over by school personnel.

Amicus can add a perspective to the issues not adequately presented by the parties in this matter. This perspective deplores the insensitivity to the needs and desires of the students shown by the decision of the Court of Appeals below. This perspective also includes rejection of the notion that after-school meetings or before-school meetings in any way involve a "captive audience." This perspective also rejects the notion that students are so susceptible to religiously oriented peer pressure that the non-religious student will be coerced into attending religious meetings against his own wishes and against

the commands of his parents. Amicus strongly disagrees with the suggestion underlying the decision below that simply because a governmental entity allows neutral accommodation of religious exercise, the Establishment Clause is somehow violated because *someone may think* the governmental agency has a sympathetic attitude toward religious practitioners.

Amicus also argues that the Lubbock "equal access" policy protects the rights of public school students, while also respecting the right of parents to control the extent to which their children will be permitted to participate in religiously oriented extracurricular activities. Amicus appreciates the attempt by the Lubbock Independent School District to provide a neutral accommodation for student activities which does not discriminate against those students desiring to meet to pray together, and amicus contends that the decision of the Court of Appeals has unjustifiably interfered with a neutral accommodation policy.

Those individuals comprising amicus are also concerned about the national implications of the decision below, which will cause every school district in this country to be fearful of providing any accommodation at all for noncurricular student religious exercise.

The Court must determine whether the complex issues in this case demand full consideration by this Court. Counsel for amicus brings some experience and expertise to these issues, having served as counsel to the University student group "Cornerstone" in *Widmar v. Vincent*, 102 S.Ct. 269 (1981), in which this Court ruled that university religious groups were entitled to the benefits of an "equal access" policy because the Establishment Clause does not require the discriminatory withholding of facilities from religious groups at a public university.

For the foregoing reasons, amicus strongly supports the petition for certiorari and urges the Court to accept and consider the accompanying brief which sets forth the reasons for that support.

Respectfully submitted,

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Dated: December 13, 1982

APPENDIX TO MOTION

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1. Miss Carrie Cassell
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   Lubbock, Texas 79424
   15 years of age -
   Monterey High School

2. Mr. and Mrs. Emory Cassell
   P. O. Box 64538
   Lubbock, Texas 79424
   Parents of Carrie Cassell

3. Kurt Morgan
   3312 80th Street
   Lubbock, Texas 79424
   16 years of age -
   Monterey High School

4. Mr. and Mrs. Jerry Morgan
   3312 80th Street
   Lubbock, Texas 79424
   Parents of Kurt Morgan

5. Miss Stacy Weeks
   2119 67th Street
   Lubbock, Texas 79412
   15 years of age -
   Monterey High School

6. Mr. and Mrs. Wayne Weeks
   2119 67th Street
   Lubbock, Texas 79412
   Parents of Stacy Weeks

7. Chris Buford
   3801 40th Street
   Lubbock, Texas 79413
   17 years of age -
   Coronado High School

8. Mr. and Mrs. Buddy Buford
   3801 40th Street
   Lubbock, Texas 79413
   Parents of Chris Buford

9. Miss Sarah Willis
   2317 49th Street
   Lubbock, Texas 79412
   17 years of age -
   Monterey High School

10. Mr. and Mrs. Arlie Willis
    2317 49th Street
    Lubbock, Texas 79412
    Parents of Sarah Willis

11. Miss Laura Lemon
    4602 14th Street
    Lubbock, Texas 79416
    17 years of age -
    Coronado High School

12. Dr. and Mrs. Lee Lemon
    4602 14th Street
    Lubbock, Texas 79416
    Parents of Laura Lemon

13. Sherman Button
4311 56th Street
Lubbock, Texas 79413
15 years of age -
Monterey High School

14. Mr. and Mrs. Tom Button
4311 56th Street
Lubbock, Texas 79413
Parents of Sherman Button

15. Miss Laura Johnson
2301 60th Street
Lubbock, Texas 79412
15 years of age -
Monterey High School

16. Mr. and Mrs. Phil Johnson
2301 60th Street
Lubbock, Texas 79412
Parents of Laura Johnson

17. David Workman
5213 70th Street
Lubbock, Texas 79424
17 years of age -
Coronado High School

18. Mr. and Mrs. Don Workman
5213 70th Street
Lubbock, Texas 79424
Parents of David Workman

19. Miss Clarissa McQueen
7607 Kenton
Lubbock, Texas 79423
16 years of age -
Coronado High School

20. Mr. and Mrs. Duane McQueen
7607 Kenton
Lubbock, Texas 79423
Parents of Clarissa McQueen

21. Randy Carman
2703 78th Street
Lubbock, Texas 79423
17 years of age -
Monterey High School

22. Mr. and Mrs. Jack Carman
2703 78th Street
Lubbock, Texas 79423
Parents of Randy Carman

23. Tim Parker
4601 33rd Street
Lubbock, Texas 79410
17 years of age -
Coronado High School

24. Mr. and Mrs. Frank B. Parker
4601 33rd Street
Lubbock, Texas 79410
Parents of Tim Parker

25. Miss Pam Lowery
3809 53rd Street
Lubbock, Texas 79413
17 years of age -
Monterey High School

26. Mr. and Mrs. Richard Lowery
3809 53rd Street
Lubbock, Texas 79413
Parents of Pam Lowery

BRIEF OF THE AD HOC GROUP OF STUDENTS AND PARENTS IN THE LUBBOCK INDEPENDENT SCHOOL DISTRICT

INTEREST OF AMICUS CURIAE

The individuals comprising the group of students and parents (listed in the appendix to the Motion for Leave to File Brief) are students at the Monterey and Coronado High Schools in the Lubbock Independent School District. The ages of the students in this group range from 15 to 17 years. Parents of these students are engaged in a variety of occupations in the community, and the families represented herein are from various religious backgrounds. These students participate in a number of secular extra-curricular activities including Music Club, Industrial Arts Club, Tri-Hi-Y and Hi-Y, Band, Future Homemakers of America, and the school newspaper. These students also desire to participate in religious activities, including the fellowship of Christian Athletes, Young Life, and an informal Tuesday Bible study and prayer time. At the present time, the religious activities are not accommodated on school property, due to the decision below with a resulting disadvantage to these students.

As indicated in the motion for leave to file this brief, the religious beliefs of these students are of paramount significance in their lives. Group prayer plays a vital role. The lack of sensitivity to this fact demonstrated in the Court of Appeals' decision, is baffling and threatening to these students and their parents. These students and parents recognize the necessity to remove religious indoctrination and worship from the public school curriculum, but they do have trouble accepting the notion that there is something so terribly awful about student prayer and Bible study that no students can meet, even

after school, because there is a "danger" that someone will misinterpret the school board's intentions in accommodating such students. They also fear that the trend of religious families to remove their children from the public schools will be intensified by the decision below, thus further threatening the pluralism of the public school.

Because the decision of this Court with regard to whether to review the Court of Appeals' decision herein is of utmost consequence to the personal rights and liberties of these students and their parents, amicus is vitally concerned that this Court review the decision below.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the petition for certiorari, stressing only that the Court of Appeals held that the school district's policy of permitting students of all groups to gather at the school outside of regular school hours is unconstitutional *on its face*. App. A to Petition for Certiorari, pp. 13a-23a.

ARGUMENT

I. This Case Is One of Great Constitutional and Public Significance Affecting the Rights of Public School Students and Their Parents Nationally.

This case uniquely presents the issue of whether a local school district can constitutionally make *any* noncurricular accommodation of student religious exercise.[1]

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1. The case of *Brandon v. Board of Education of Guilderland School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 71 L.Ed.2d 109 (1981), presented a different issue to the Court in that there the local school district had determined *not* to accommodate student religious gatherings, and the students contended that the Constitution *requires* such accommodation.

The decision of the Court of Appeals condemns the "equal access" policy of the Lubbock Independent School District in such sweeping language that, if this decision is allowed to stand, it will force every school district in this nation to take a stand against accommodation of all voluntary student religious activities, even those occurring outside of regular school hours. The confusion generated by this decision may well cause school attorneys and administrators to believe that they have an affirmative duty to suppress all religious activity on school property, even to the point of restricting the right of a few students to pray together in an isolated spot in a hallway or in the schoolyard when not in class.

This confusion is of great concern to the religious student, who has a deep commitment to the practice of his faith, which includes both individual prayer and group prayer. His religious beliefs are of paramount significance in his life, and the exercise of his religion requires an opportunity to express his faith in prayer and discussion with other students. Such students in Lubbock are now required to conduct their religious activities (some of the students are involved in Fellowship of Christian Athletes, Young Life Club, and a Tuesday morning prayer and Bible study) away from the school grounds. Since many of the students lack independent transportation, such meetings are impractical. Furthermore, when many other groups are permitted to meet on school property, the religious student views his religious activity as singled out for discriminatory treatment. Amicus is further concerned that the decision may tend to adversely affect the present religious pluralism of the public schools by accelerating the tendency of many religious families to remove their children from the public schools, which they view as increasingly hostile to their religious beliefs.

There exists a "happy medium" within the realm of accommodation of private religious exercise which recognizes the needs of the religious student, and yet does not in any way infringe the rights of the non-believer. This decision below, if allowed to stand, will do nothing to help schools or courts find that "happy medium," and the rights of students such as those represented in this amicus group will be trampled needlessly.

II. The Court of Appeals' Decision Is in Conflict With Applicable Principles Established by This Court.

The decision of the trial court striking down the school policies in effect prior to the August 26, 1980, policy was consistent with the decisions of this Court in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Township School District v. Schempp*, 374 U.S. 203 (1963). The Court also wisely recognized that whether or not the August 26, 1980, policy infringed the Establishment Clause would depend upon the implementation and administration of the policy. Facially, the policy was not in violation of the Establishment Clause since it simply permits students of all groups to gather at the school, either before or after regular hours, on the same basis as other groups. App. B to Petition for Certiorari, p. 32a.

The trial court decision upholding the revised policy is consistent with *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) and *Board of Education v. Pico*, 73 L.Ed.2d 435 (1982), both of which recognize that students have certain First Amendment rights of expression and association, and that a child is not a mere "closed-circuit recipient of only that which the State chooses to communicate." *Tinker, supra*, at 511. These cases recognize that students are old enough to have some ideas and to express them. The students have also been exposed to a

sufficient number of differing experiences and viewpoints in life that they are able to evaluate the suggestions of their peers and teachers and to make their own judgments. If students need not be protected from the vulgar, obscene material restored to the libraries in the *Pico* case,[2] it seems unlikely that they need to be "protected" from an invitation to attend a before-school or after-school prayer meeting.

The Court of Appeals' decision in this case is inconsistent with the principles of *Tinker* and *Pico*. in that the Court decided that any appearance of accommodation of religion by the school was "too dangerous to permit." App. A to Petition for Certiorari, p. 16a (quoting *Brandon v. Board of Education*, 635 F.2d at 978). Unfortunately, the whole business of the "impressionability" of the students does little to aid Establishment Clause analysis. The idea that just because students are permitted to initiate prayer meetings outside of school ... s means that many or all of the students are going to assume the school wants everyone to be religious is unsubstantiated, not only in the record of this case, but also in normal experience. In any event, the "impressionability" of the students may be to some extent a hopeless whipsaw. If school children are so simplistic and impressionable as to believe that after-school religious meetings bear the "imprimatur" of the school, then it seems that they would also be sufficiently impressionable and simplistic to believe that the refusal to accommodate religious activities to any degree (while other activities are accommodated), amounts to the school's abnegation of religion. Who is to say that it is constitutionally more acceptable for the school to be

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2. Excerpts from the material found objectionable by the local school board are appended to the dissent of Powell, J., 73 L.Ed.2d 466-470.

perceived as hostile to religion, than for the school to be perceived as accommodating to religion?

In the face of the rather sparse record in this case, it seems wise to follow the course chosen by the trial court, which was, in effect, to reserve judgment as to the "primary effect" of such a policy until adequate facts are developed showing whether such a policy does in fact result in a violation of the Establishment Clause. Instead, the Court of Appeals unfortunately decided to follow the superficial conclusions of the *Brandon* case that such accommodation is "too dangerous to permit." App. A at 16a.

The Court of Appeals' analyses on the issues of "secular purpose," and "excessive entanglement" are also clearly faulty. First of all, the Court determines that the policy was written with a religious purpose simply because it "appears in the middle of a policy concerned with religious activities in the schools." App. A, at 13a. It is difficult to imagine where else one would expect to find the policy since paragraph 4 was written as a part of the revisions which the school district made in an effect to comply with constitutional requirements. Nevertheless, amicus submits that the Court of Appeals became so concerned about punishing the school district for what it apparently felt was bad faith (contrary to the District Court, which found the revised policy was in good faith (App. at 33a)) that the Court failed to give guidance to the school district so that the needs of the religious students could be accommodated in a proper fashion. Obviously, to move the location of paragraph 4 within the regulations would simply look like more "bad faith." Therefore, there would appear to be nothing that the School District can do at this point to accommodate any religious activities at all. This punishes the students such as those represented in this group much more than

it does the School District, and the students deeply regret the lack of sensitivity to their rights shown by the Court of Appeals' decision.

The finding of "excessive entanglement" resulting simply from the monitoring of meetings to prevent violence to students and property[4] is not supportable. *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965). In fact, as noted in *Widmar v. Vincent*, 70 L.Ed.2d 440, 449, n. 11, the attempt to monitor student meetings in order to suppress religious content is far more "entangling." See also *Chess v. Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980).

The Court of Appeals' decision is also inconsistent with the principle that religious expression is entitled to the same degree of constitutional protection as speech on other subjects. *Widmar, supra*, at 447. *Heffron v. International Society for Krisha Consciousness, Inc.*, 69 L.Ed.2d 298 (1981). Included in that First Amendment protection is prayer and devotional expression. *Widmar, supra*, at 448 n. 9.

The Court of Appeals' decision is further inconsistent with the principles of individual "voluntarism" and government "neutrality" which underlie the Establishment Clause. *Walz v. Tax Commission*, 397 U.S. 664, 694-697 (1970) (Harlan, J., concurring); *Abington Township School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). These principles safeguard the freedom to believe and the freedom to disbelieve by affording protection from government action either actively encouraging or discouraging participation in religion. Neutrality, according

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4. The School District has contended that the words "with supervision" in the policy mean nothing more than the type of "supervision" provided by a uniformed guard at a high school dance or football game. The District Court apparently accepted this contention, which was appropriate in view of the lack of evidence to the contrary.

to Justice Harlan, requires an "equal protection mode of analysis." *Walz, supra,* at 696; cf. *McDaniel v. Paty,* 435 U.S. 618, 631-635 (Brennan, J., concurring). See also Kurland, *Of Church and State and the Supreme Court,* 29 U. Chi. L. Rev. 1, 5 (1961).

Here the school district has adopted a neutral policy, calling for no religious classifications with regard to accommodation of special interest group meetings. The Court of Appeals' decision overturning such policy as facially invalid flies in the face of such principles by negating individual voluntarism and requiring a religious classification which requires the State, in effect, to be "hostile" to religion. App. D at p. 41a (dissent of Reavley, et al., to Denial of Rehearing En Banc); *Chess v. Widmar,* 635 F.2d 1310, 1317 (8th Cir. 1980).

The decision of the Court of Appeals is also inconsistent with the important distinction drawn by this Court between government "sponsorship" of religion and neutral government "accommodation" of the religious activities of private individuals.[5] *Zorach v. Clausson,* 343 U.S. 306 (1952). *Widmar v. Vincent, supra; Walz v. Tax Commission, supra,* at 669. The Court of Appeals leaves these concepts in confusion by suggesting that if any students, acting on their own initiative, influence other students religiously, the Establishment Clause is violated. Moreover, it suggests that simply because someone might perceive the school board as accommodating to religion, the Establishment Clause is violated. Yet the failure to identify the precise evil connected with such appearance of accommodation hinders intelligent balancing of that evil against the interest of the students in exercising their fundamental

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5. Some lower court decisions also reflecting this distinction are *O'Hair v. Paine,* 312 F.Supp. 434 (W.D. Tex. 1969) *aff'd per curiam,* 432 F.2d 66 (5th Cir. 1970), *cert. denied,* 401 U.S. 955 (1971); *O'Hair v. Andrus,* 613 F.2d 931 (D.C. Cir. 1979).

freedoms of speech and religious exercise. It is necessary for this Court to come to grips with this issue in the context of the public school. This case affords that opportunity, indeed the duty, to do so.

The decisions of the Court concerning public school sponsorship of religion have been misconstrued by some lower courts in such a way as to cause the State to turn a "cold shoulder" to the needs and desires of the religious students. The students included in this ad hoc group desire only equal accommodation of their activities—no sponsorship and no favoritism. They desire that the school board be permitted to arrive at a constitutionally valid accommodation of religion. "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission, supra,* at 669. Amicus implores this Court to review the decision below in order to help define the permissible range of public school accommodation of private religious exercise consistent with the purposes of the First Amendment.

CONCLUSION

The students and parents comprising this ad hoc group pray this Court to grant a writ of certiorari in order to give these issues of utmost significance a full and fair consideration.

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